IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 200.

FLOYD AFFOLDER,
Petitioner,

vs.

NEW YORK, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

JURISDICTION.

1. Inasmuch as the writ has now been granted, we shall not discuss here the propriety of the review in this case. Our views are set out in our Suggestions in Opposition to the Granting of the Writ, commencing page 3.

2. Petitioner's Prayer for the Writ (Petition, page 26), after praying for a review by this Court of the opinion, asks for this ultimate relief:

> "that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed and the judgment of the District Court therein be affirmed, and that petitioner have such other relief as to this Court may seem meet and proper."

Inasmuch as it would be impossible to reverse the judgment of the Court of Appeals and to affirm the judgment of the District Court without disposing of the two claims of error made by respondent and decided adversely to it, this Court has before it the entire cause. Delk v. St. Louis & San Francisco R. R., 220 U. S. 580, 588, 589; Camp v. Gress, 250 U. S. 308, 318.

The petitioner's prayer was not a limited one, seeking a review of only one issue, as in the case of Connecticut Ry. Co. v. Palmer, 305 U. S. 493, 506, or Rorick v. Devon Syndicate, 307 U. S. 299, 303.

This Court should therefore pass upon the three questions considered by the Court of Appeals, viz.:

1. Was a case made for the jury on the issue of causation?

2. Was the jury erroneously instructed on the application of the facts to the coupler statute?

3. Did the trial court abuse his discretion in reviewing the amount of the verdict?

STATEMENT OF THE CASE.

We adopt as a fair statement of this case the recital of facts in the opinion of the Court of Appeals (174 F. 2d 486, 487, 488, C. C. A. 8):

"Plaintiff lived at Fort Wayne, Indiana, and was employed by defendant in interstate commerce as a switchman in defendant's yards at Fort Wayne at the time of his injury on September 24, 1947. He was one of a crew of five men comprising a switch engine crew engaged in the classification of cars in the defendant's yards at Fort Wayne. The switch tracks involved herein were substantially parallel and ran east and west, sloping toward the east. In classifying, or sorting, the cars in the yard six or seven cars were run onto the eastbound main switch from the west and stopped approximately fifteen car lengths west of the east end of that switch track. Plaintiff, the 'field man' of the crew, had the duty of setting the brakes on cars spotted and attending to duties away from the engine. The other switchmen stayed with the engine and such cars as might be attached thereto. Plaintiff set the brake on one of these six or seven cars in order that they would remain in place as others were added. The process of sorting or classifying the cars in the yard proceeded until 25 cars had been accumulated on this particular track. The west car of this group of 25 was a Rock Island car. When the Rock Island car was put on this track, it was 'kicked in'—an operation consisting of the engine giving it a 'bump' from the west, starting it rolling east on the eastbound main switch, then cutting it loose from the engine and allowing it to roll on down to the other cars and automatically couple to them by impact. When the Rock Island car was cut loose

from the engine the coupler at its west end was opened by the other or 'head' switchman in order that the next car that was added would automatically couple to it. The next car to be added was a Pennsylvania hopper car. When it was 'kicked in,' the coupler on its east end was opened by the 'head' switchman. If the couplers were operating properly and either the one on the west end of the Rock Island car or the one on the east end of the Pennsylvania car was open the cars would automatically couple and become locked together, hence the opening of the coupling on the east end of the Pennsylvania car at that time was a precaution against the possibility that the Rock Island car's west coupler had become closed by its impact with the other 24 at the time it was 'kicked' in against them. When the coupler on the Pennsylvania car was opened the head switchman testified that the lever 'bound,' or stuck, requiring two or three efforts on his part to open it. Later the lever bracket was found to be bent. There was testimony pro and con as to whether that would interfere with the automatic working of the coupler. The head switchman was positive in his testimony that although he had some difficulty in doing so he put the coupler on the east end of the Pennsylvania car in proper position to operate on impact. The Pennsylvania car was 'kicked' down to the Rock Island car, but, unknown to the crew at that time, it did not couple. Three other cars were added to the group on this track in either two or three separate operations. When the last, or twenty-ninth, car was added, plaintiff was completing an operation of riding a car down on the fifth track south of the eastbound main track. This last operation incident to the 29 cars consisted of the engine shoving a car east against those already on the eastbound main, then shoving the entire group

east along the track to make room for the twenty-ninth car. But when the engine had shoved the entire group a sufficient distance east and stopped, a separation occurred between the Rock Island car and the Pennsylvania car and all of the 25 cars east of the Pennsylvania car left those coupled to the engine and continued to roll down the track to the east. When they had gone approximately two car lengths plaintiff saw they were loose and, having been frequently instructed to stop cars under such circumstances, ran north across the intervening tracks toward the loose cars for the purpose of setting a brake on one of them to stop them. When he got almost to the east end of the west, or Rock Island, car, and approximately two or three feet from it, he stepped on something that rolled under his foot and caused him to fall forward under the car. The wheels of the car ran over his right leg and so mangled it that it was necessary to amputate it, leaving a stump only four inches in length.

"[1] The parties are in agreement that the failure of the Pennsylvania and Rock Island cars to couple on impact was sufficient evidence from which the jury could, if it saw fit, properly infer that defendant had violated the Safety Appliance Act in not equipping its cars with 'couplers coupling automatically.' That is the law. Chicago, R. I. & P. R. Co. v. Brown, 229 U. S. 317, 33 S. Ct. 840, 57 L. Ed. 1204; Southern R. Co. v. Stewart, 8 Cir., 119 F. 2d 85; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995. The trial court so understood it. And there was no dispute concerning the fact that these cars did not couple automatically. Defendant contended at the trial that this was not because they were not properly equipped with automatic couplers but was more likely caused by the closing of the

coupler on the Rock Island car on its impact when it was kicked in, a contingency which the testimony indicated was not unusual, and the failure of the head switchman to open the coupler on the Pennsylvania car when it was sent down against the Rock Island. If both couplers were closed, there could have been no automatic coupling of the cars on impact even if the couplers were in proper condition."

One correction should be made.

The opinion recites (l. c. 487):

"Three grounds for reversal are asserted: • • • and third, that the verdict was excessive."

Actually the third assignment was (Brief of Appellant, page 17):

"The verdict was so greatly excessive that the trial court, in reducing the verdict by remittitur from $95,000 to $80,000 instead of awarding a new trial, was guilty of an abuse of discretion."

SUMMARY OF THE ARGUMENT.

1.

A case was not made for the jury on the issue of causation.

Davis v. Wolfe, 263 U. S. 239.

a. Where the employee was actually engaged in using a defective safety appliance when he was injured, recovery under the Safety Appliance Act has been permitted.

Minn. etc., R. Co. v. Goneau, 269 U. S. 406;
Anderson v. B. & O. R. Co., 89 F. 2d 629 (C. C. A. 2);
C. M. St. P. & P. R. Co. v. Goldhammer, 79 F. 2d 272 (C. C. A. 8);
Talbert v. C. R. I. & P. R. Co., 321 Mo. 1080, 15 S. W. 2d 762;
Foster v. Davis, 252 S. W. 433 (Mo.).

b. Where the motion, force, or energy which injured the employee was derived from the movement wherein the safety appliance failed, recovery under the Act has been permitted.

L. & N. R. Co. v. Layton, 243 U. S. 617;
Minn. & St. L. R. Co. v. Gotschall, 244 U. S. 66;
Erie R. Co. v. Caldwell, 264 Fed. 947 (C. C. A. 6);
N. Y. C. R. Co. v. Brown, 63 F. 2d 657 (C. C. A. 6);
McAllister v. St. L. M. B. T. Ry., 324 Mo. 1005, 25 S. W. 2d 791;
Coray v. So. Pac. Ry. Co., 335 U. S. 520.

c. Where the employee was not using the safety appliance, and where the motion which injured the employee was not derived from the movement in which the safety

appliance failed, recovery under the Act has been uniformly denied. This was the situation in the Affolder case.

Lang v. N. Y. C. R. Co., 255 U. S. 455;
St. L. S. F. R. Co. v. Conarty, 238 U. S. 243;
Reetz v. Chi. & E. R. Co., 46 F. 2d 50 (C. C. A. 6);
Carter v. Atlanta & St. Andrews R. Co., 170 F. 2d 719 (C. C. A. 5), cert. granted, 336 U. S. 935.

2.

The Court of Appeals properly reversed the judgment below for the reason that the trial judge erroneously instructed the jury that the plaintiff, in order to discharge his burden of proving a breach of defendant's duty, need only prove that any such coupler did in fact fail to couple automatically on impact.

Wilkerson v. McCarthy, 336 U. S. 53;
45 U. S. C. A., Sec. 2.

a. Whether a failure to couple on impact proves a violation of the statutory duty in a particular case is an inference to be drawn or to be not drawn by a jury under the seventh amendment to the Constitution of the United States.

Wilkerson v. McCarthy, 336 U. S. 53, 70;
Chicago, St. P. M. & O. Ry. Co. v. Muldowney, 130 F. (2d) 971, 975 (C. C. A. 8, 1942);
Johnson v. So. Pacific Co., 196 U. S. 1, 16;
St. L. San Francisco R. R. v. Conarty, 238 U. S. 243, 250;
L. & N. R. Co. v. Layton, 243 U. S. 617, 619;
Atlantic City R. R. Co. v. Parker, 242 U. S. 56, 59;
Myers v. Reading Co., 331 U. S. 477, 482, 484;
Vigor v. C. & O. Ry. Co., 101 F. (2d) 865 (C. C. A. 7, 1939), cert. den. 307 U. S. 635;

Chicago, M. St. P. & P. R. R. Co. v. Linehan, 66 F. (2d) 373, 378, 379 (C. C. A. 8, 1933);

Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 67;

O'Donnell v. Elgin J. & E. R. Co., 171 F. 2d 973 (7th Circuit, 1948).

b. The inference of statutory violation from operational failure is the same inference permitted in res ipsa loquitur cases. In such cases the inference, if drawn at all, must be drawn by the jury.

Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66;

Didinger v. Pennsylvania R. Co., 39 F. 2d 798 (C. C. A. 6th, 1930);

Sweeney v. Erving, 228 U. S. 233;

Chestnut v. Louisville & N. R. Co., 335 Ill. App. 254, 81 N. E. (2d) 660 (Ill. App. 1948).

c. There is no authority for the proposition advanced by Petitioner that the inference should be declared as a matter of law.

Phila. & R. Ry. Co. v. Auchenbach, 16 F. 2d 550 (C. C. A. 3);

A. T. & S. F. v. Keddy, 28 F. 2d 952 (C. C. A. 9);

Northern Securities Co. v. U. S., 193 U. S. 197.

d. While a charge must be read as a whole an incorrect particularization in a charge is not cured by a correct generalization.

New York Life v. Hunter, 32 F. 2d 173 (C. C. A. 8th, 1929);

Standard Life & Accident Ins. Co. v. Sale, 121 F. 664, 57 C. C. A. 418, 61 L. R. A. 337 (C. C. A. 6th, 1903).

e. Since the jury was not permitted to make its own decision on whether the inference should be drawn, respond-

ent was deprived of a jury trial on this issue, in contravention of the seventh amendment of the United States Constitution, and the Court of Appeals correctly ordered a new trial.

Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29.

3.

In the event the court should hold that the case was properly submitted to the jury, the cause should be remanded to the Court of Appeals with directions to pass upon the Respondent's point that the trial judge abused his discretion in not awarding a new trial.

Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, 408 (C. C. A. 4)

U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 126.

ARGUMENT.

1.

Was a Case Made for the Jury on the Question of Causation?

Because a decision of **no causation** will dispose of all other issues, this issue will be discussed first.

The failure to couple (whatever its cause) was an accomplished fact long before the injury. Two or three separate operations on this same track had taken place subsequently (Opinion, l. c. 488), and at least one other subsequent movement had taken place on another track, in which Affolder was "riding a car down on the fifth track" (ibid.). During this interval the two uncoupled cars remained stationary, end to end. In order to place one more car on the track the engine crew shoved the whole string of cars far enough to clear the switch (ibid.). Affolder, who had set the brake on one of the first cars set in on the track (l. c. 487), saw the cars moving and not connected with the engine, and was injured trying to board and stop them. It was his duty, he thought, "To stop these cars from running down the main [track]" (R. 24).

The cases all seek to apply the general rule expressed by this Court in Davis v. Wolfe, 263 U. S. 239, 243:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental situation in which the accident, otherwise caused, results in such injury; and, on the

other hand he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

The trigger of the accident was not the **separation** of the cars. The separation, it was agreed, had existed during the several preceding movements, and was no cause for alarm. **The law forbids the use of cars not equipped with couplers coupling automatically by impact. It does not forbid the use of uncoupled cars.** And the cars might have been uncoupled deliberately, or deliberately never coupled at all for convenience in subsequent handling, without altering the "situation" one whit.

The trigger of the accident was the **motion** of the cars. Affolder wanted to perform his duty "To stop these cars from running down the main" (R. 24). It was his duty as fieldman to see "that [the cars placed on the tracks are tied down with an Ajax brake" (R. 22). He had set an Ajax brake on one of the cars toward the east end of the track (R. 22). He testified: "My instructions were to apply brakes on any cars that were running away down at the other end of the yard" (R. 38).

On the other hand, the coupling or uncoupling of the cars was not Affolder's concern. He testified (R. 30):

> "). These cars that were put in on the eastbound main, including the ones that separated, that we have numbered and described here, had you done anything with reference to putting them on the eastbound main, either kicking them in or riding them in, or doing anything with reference to the cars that were put in on the eastbound main, other than the first group that

you tied an Ajax brake down when they shoved in originally? A. No. I didn't have anything to do with the cars that were kicked down.

Q. Who was looking after that end of the work? A. The pin man and the conductor."

And at R. 22 he testified:

"The head [pin] man holds [lifts?] pins and opens knuckles, and cuts the cars off."

There was at least one and probably there were two kick movements, in which cars were rolled, free of the engine, down the track against the standing string of cars tied down with an Ajax brake, all of which occurred **after** the uncoupled condition existed, and **before** the shove movement in which the accident happened (R. 57. Plaintiff's witness, Tielker, the pin man, on direct). Had either of these kicks set the whole string to rolling down hill, would not the situation in which Affolder was injured have been identical? Would it have made any conceivable difference in the sequence of events producing the injury that there was a separation between some of the entire string of free-rolling cars?

It is plain that Affolder's duty, his impulse, and his injury would have been the same whether one car, several cars, or the whole string was rolling, whether the uncoupled condition was deliberate or intentional, or even whether the movement in which he was injured had included (as most of the previous movements had) cutting part or all of the string of cars away from the engine.

By this test it is possible to reconcile the previous cases on the subject. Aside from cases involving the handling of the defective appliance, **it is a question of whether the injury was caused by the movement in which the coupler**

failed. Where the cars have come to rest following the failure, or even where the motion has become normal following the failure (Carter case, infra), recovery has been uniformly disallowed.

All of the cases cited by either party on this subject in the Court of Appeals fall into one of three categories:

1. Cases in which the employee was actually engaged in using the appliance when he was injured. Recovery allowed in each case:

Minn., etc., R. Co. v. Gonean, 269 U. S. 406;
Anderson v. B. & O. R. Co., 89 F. 2d 629 (C. C. A. 2);
C. M. St. P. & P. R. Co. v. Goldhammer, 79 F. 2d 272 (C. C. A. 8);
Talbert v. C. R. I. & P. R. Co., 321 Mo. 1080, 15 S. W. 2d 762;
Foster v. Davis, 252 S. W. 433 (Mo.).

2. Cases in which the motion (kinetic energy) producing the injury was derived from the movement in which the coupler failed. Recovery allowed in each case:

L. & N. R. Co. v. Layton, 243 U. S. 617;
Minn. & St. L. R. Co. v. Gotschall, 244 U. S. 66;
Erie R. Co. v. Caldwell, 264 Fed. 947 (C. C. A. 6);
N. Y. C. R. Co. v. Brown, 63 F. 2d 657 (C. C. A. 6);
McAllister v. St. L. M. B. T. Ry., 324 Mo. 1005, 25 S. W. 2d 791.

3. Cases in which the employee was not actually engaged in using the appliance when he was injured, and in which the motion producing the injury was not derived from the movement in which the coupler failed. Recovery denied in each case:

Lang v. N. Y. C. R. Co., 255 U. S. 455;
St. L. S. F. R. Co. v. Conarty, 238 U. S. 243;

Reetz v. Chi. and E. R. Co., 46 F. 2d 50 (C. C. A. 6);
Carter v. Atlanta & St. Andrews R. Co., 170 F. 2d 719, cert. granted, 336 U. S. 935.

Too late for citation in the Court of Appeals, but proper for inclusion in the second category, is the case of Coray v. Southern Pacific Ry. Co., 335 U. S. 520, in which this Court held there was a submissible case of causation in the rear-end collision of a following motor car with a train suddenly stopped by the failure of the air brakes. There again the motion which caused the injury—the relative motion of train and car, previously static, became kinetic upon the failure of the brake system. Had the motor car succeeded in stopping behind the train in the Coray case, and had either thereafter started up and collided with the other, a situation analogous to the Affolder case would have existed.

The problem of causal connection *vel non* in the Affolder case is legally identical with the same problem in the Carter case. In both cases the uncoupled condition of the cars was an accomplished fact, and the motion producing the injury was caused by a subsequent movement. In the Carter case it was the second (successful) effort to couple. In the Affolder case it was the shove movement, several movements later.

In both cases the failure to couple "created a condition or set the stage, with respect to which a new act was to operate." 170 F. 2d, l. c. 721.

In both cases, under the rule laid down in Davis v. Wolfe, 263 U. S. 239, 243, the injured man is not entitled to recover.

As the Carter case is now under submission in this Court on another certiorari, we do not presume to labor

the point of law which was exhaustively discussed in the briefs in that case.

But the two cases are indistinguishable on this point, and if the Carter opinion is affirmed, recovery cannot be allowed in the Affolder case, at least on the only theory which plaintiff presented below. Respondent's motion for a directed verdict should be sustained, or the cause remanded to give Petitioner an opportunity to find another ground of recovery.

2.

Was the Jury Erroneously Instructed on the Application of the Facts to the Coupler Statute?

For the discussion of the second point (the critical point in the Court of Appeals) we can find no better starting point than the three observations of Mr. Justice Douglas (joined by the late Mr. Justice Murphy and the late Mr. Justice Rutledge) in Wilkerson v. McCarthy, 336 U. S. 53, 70:

> "1. The basis of liability has not been shifted from negligence to absolute liability.
>
> "2. The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.
>
> "3. The historic role of the jury in performing that function * * *, is being restored in this important class of cases."

The sense of the first observation is not lost in Safety Appliance Act cases whether we regard statutory violation as negligence per se or whether we regard it as inde-

pendent ground of liability. The effect is the same in either light.

The "historic role" in the third observation is that guaranteed by the seventh amendment to the Constitution of the United States.

The statute sued on (45 U. S. C. A., Sec. 2) provides:

> "Automatic couplers.
>
> "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car * * * not equipped with couplers coupling automatically by impact * * *."

The criticized portion of the charge (R. 163) is as follows:

> "The plaintiff, in order to discharge the burden of proving a breach of defendant's duty, is not required to prove the existence of any defect in such coupler, but need only prove that any such coupler did in fact fail to couple automatically by impact."

The exception taken on this point (R. 170-171, 172-173) was explicit and persistent and presented the identical point here argued.

That the point is a crucial one, so far as the submission is concerned, appears from the arguments made by plaintiff's and defendant's counsel.

Plaintiff's counsel argued (R. 136-137):

> "The plaintiff's duty is satisfied as long as you find that the couplers on this occasion when put in position to operate properly did not make or did not come together by impact. That is all there is to it, in so far

as that particular phase of the case is concerned. I hope I make myself clear on that."

Defendant's counsel argued (R. 145):

"Now, with reference to the first of the two allegations, Mr. Eagleton has told you what he thinks the law is going to be. That is merely his opinion about the law, and what I say and what he says about the law does not necessarily bind you, unless it coincides with what his Honor tells you the law is, and I think he is wrong about that.

"He says it is only necessary to show that there was no coupling. I say he is wrong. I say he must show that there was a failure to couple because the car was not equipped with couplers coupling automatically by impact. If they did not couple, and if they did not couple because of some other reason other than the workability of the couplers themselves when properly operated, then there is no liability in this case."

The charge explicitly resolved this dispute as to the law in favor of the plaintiff, and a verdict in his favor had to follow (omitting the problem of causation) because it was conceded that the couplers on the Rock Island and the Pennsylvania cars "did in fact fail to couple automatically by impact", and this was the sole index of liability given the jury by the court. It was not conceded, however, that the cause of the failure was that the cars were not equipped with couplers coupling automatically on impact. This is the index of liability given by the statute.

Defendant strenuously insisted that the cars were so equipped, and that the failure to couple was because of improper use, rather than improper equipment.

The criterion of the charge was **"did they in fact fail to couple?"**

The criterion of the statute is "**were they equipped with efficient couplers?**"

Just as it takes two quarrellers to make a quarrel, it takes two couplers to make a **coupling**. The statute requires that cars be equipped with couplers **coupling** automatically by impact. Obviously, if cars are impacted, one of which has an efficient (coupling) coupler, and one of which has a defective (non-coupling) coupler, and an accident results, liability must arise from the use of the car with the defective coupler, and not from use of the one with the efficient coupler.

Suppose Railroad A kicks its car (a) precisely af a transfer point against car (b), standing on tracks belonging to Railroad B, at the request of Railroad B. Suppose car (a)'s coupler is efficient and (b)'s is defective. Railroad B would have violated the statute and Railroad A would not have. But the charge, which declares liability if "any such coupler [car (a)'s] did in fact fail to couple automatically by impact", would allow recovery for a resulting accident equally against both, for neither the good car nor the bad car did, "in fact", couple.

Now it is true that the courts hold that proof of failure to couple upon a fair trial authorizes a **permissive inference** of equipment with one or more inefficient couplers. **But this inference must be made by the jury. It cannot (as it was here) be crammed down their throats by the court.**

The wording of the charge just preceding the quoted portion was taken (for "Mr. Eagleton's" offered instruction [Tr. 173] which became a part of the charge) from the opinion in Chicago, St. P. M. & O. Ry. Co. v. Muldowney, 130 F. (2d) 971, 975 (C. C. A. 8, 1942). But far from justifying the quoted portion, the Muldowney opinion condemns it. The Court there said (l. c. 976):

> "If this testimony was admissible, it was, we think, when considered with all the attending facts and circumstances, sufficient **to warrant the jury** in finding that before the accident the drawbars were out of alignment to such an extent that a coupling could not be made automatically on impact."

From this statement two rules emerge clear: 1. That the criterion of statutory violation is not whether a coupler "**did in fact fail to couple automatically by impact,**" but whether the coupler was in such condition "**that a coupling COULD NOT be made automatically on impact.**" 2. That the application of this criterion is a jury and not a legal issue (Cf. Justice Douglas' second observation, supra).

That the Muldowney opinion was correct, and the trial court not, on the first rule is clear.

In Johnson v. Southern Pacific Co., 196 U. S. 1, 16 (1904), this Court held:

> "But we think that what the act plainly forbade was the use of cars which **could not be coupled** together automatically by impact by means of the couplers actually used on the cars to be coupled."

And in St. L. San Francisco R. R. v. Conarty, 238 U. S. 243, 250 (1914), this Court held:

> "The Safety Appliance Acts make it unlawful to use or haul upon a railroad which is a highway for interstate commerce any car that is not equipped with automatic couplers whereby the car **can be coupled** or uncoupled 'without the necessity of men going between the ends of the cars' . . ."

And in L. & N. R. Co. v. Layton, 243 U. S. 617, 619, the following charge was held correctly to declare the law:

> "'He must have shown to your satisfaction by a preponderance of the evidence' either that the cars had never been equipped with proper couplers, or that, if they had been so equipped, they were in such condition that **they would not couple automatically by impact** . . ."

That the Muldowney opinion was correct on the second rule, and that the trial court was not, is apparent from a review of the authorities.

In Atlantic City R. R. Co. v. Parker, 242 U. S. 56, 59 (1916), this Court (Mr. Justice Holmes) held:

> "If there was evidence that the railroad failed to furnish such 'couplers coupling automatically by impact' as the statute requires (Johnson v. Southern Pacific Co., 196 U. S. 1, 18, 19), nothing else needs to be considered. We are of opinion that there was enough evidence to go to the jury upon that point. No doubt there are arguments that the jury should have decided the other way. Some lateral play must be allowed to drawheads, and further, the car was on a curve, which of course would tend to throw the coupler out of line. But the jury were warranted in finding that the curve was so slight as not to affect the case and in regarding the track as for this purpose a straight line. If couplers failed to couple automatically upon a straight track it at least may be said that **a jury would be warranted in finding** that a lateral play so great as to prevent coupling was not needed, and that, in the absence of any explanation believed by them, the failure indicated **that the railroad had not fully complied with the law.** Chicago, Burlington & Quincy Ry. Co. v. United States, 220 U. S. 559, 571; Chicago, Rock Island & Pacific Ry. Co. v. Brown, 229 U. S. 317, 320, 321; San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U. S. 476, 484."

In Myers v. Reading Co., 331 U. S. 477, 482, 484 (1946), an alleged safety appliance defect in a brake was involved. While that was a brake and this is a coupler, the principle of law is identical. Coupler cases are cited as authority for the holding as follows:

> "A railroad subject to the Safety Appliance Acts may be found liable if the jury reasonably can infer from the evidence merely that the hand brake which caused the injuries—was not an 'efficient' hand brake. • • •
>
> "That testimony was not descriptive of precise mechanical defects in the structure of the brake. It was, however, simple and direct testimony from which a **jury reasonably might infer** the brake's defectiveness and its inefficiency in the sense necessary to establish a **violation of the Safety Appliance Acts.**"

In Vigor v. C. & O., 101 F. (2d) 865, l. c. 865 (C. C. A. 7, 1939), cert. den. 307 U. S. 635, the Court held, quoting Roberts, Federal Liabilities of Carriers, as follows:

> "'• • • proof that cars became uncoupled while in use • • • is evidence from which a **jury is entitled to infer** that the coupler was not in condition to perform the function required of it by the statute, and hence that the Act was violated • • •.'
>
> "We think this rule is a fair deduction from the decisions. The District Court (sitting as a jury) therefore **was warranted under the evidence in inferring that the coupler was not in condition to couple automatically by impact** • • •."

Examples of charges which, as these cases require, properly submit this inference to the jury are not hard to find.

In Chicago, M., St. P. & P. R. R. Co. v. Linehan, 66 F. (2d) 373, 378, 379 (C. C. A. 8, 1933), that Court said of the

charge: "This seems to state the law clearly" (l. c. 379). The charge was:

> "'* * * There is testimony that the mechanism to be moved in the coupler by the pin-lifting device weighs some sixty-three pounds. Now then, if Linehan failed to exert reasonable force or pull on this pin-lifting device, then, of course, failure of the device to operate is of no weight in proving a defective coupler. On the other hand, if he did apply reasonable force and customary force and the knuckle failed to open, necessitating opening the knuckle with his hands, **you should give it such weight as it is entitled to in determining the ultimate question that you are called upon to decide, and that is, whether or not the defendant equipped this car in question with couplers which would couple automatically upon impact,** and which could be uncoupled without the necessity of men going between the ends of the cars.'"

In Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66, 67, the court held:

> "**The jury, under an instruction of the court, was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function,** there being no other proof of negligence. It is insisted this was error, since as there was no other evidence of negligence on the part of the company the instruction of the court was erroneous as from whatever point of view looked at it was but an application of the principle designated as res ipsa loquitur, a doctrine the unsoundness of which, it is said, plainly results from the decisions in Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, and Looney v. Metropolitan R. R. Co., 200 U. S. 480. We think the contention is without merit because, conceding in the fullest meas-

ure the correctness of the ruling announced in the cases relied upon to the effect that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances, we are of opinion such principle is here not controlling in view of the positive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars."

The analogy to the rule of res ipsa loquitur is sound. In Safety Appliance Act cases the non-operation of the appliance authorizes the inference of inefficient equipment [negligence per se]. In certain negligence cases the occurrence authorizes the inference of negligence.

In Didinger v. Pennsylvania R. Co., 39 F. 2d 798, 799 (C. C. A. 6th, 1930), the Court, considering the failure of a brake, was discussing the propriety of authorizing an inference of statutory violation from the mere failure of the appliance. It said:

> "If the brake was properly set, as asserted, some defect must have been latent in it. Otherwise it would have held. Although the existence of negligence, in the sense of a failure to use care, is immaterial, the principle of res ipsa loquitur applies. The failure to hold under normal operation speaks for itself."

Whether the occurrence bespeaks negligence, or whether the occurrence bespeaks statutory violation does not alter the effect of this procedural rule of law. It is th **bespeaking** that we are attending to. And the rule of *inference by the jury* applied in the Safety Appliance Act cases and sought for here is universally unimpeachable in negligence cases involving res ipsa loquitur.

In Sweeney v. Erving, 228 U. S. 233, 240, this court held:

"In our opinion, res ipsa loquitur means that the facts of the occurrence **warrant the inference of negligence, not that they compel such an inference**; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted, as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

In a recent case (September, 1948) arising under the F. E. L. A., an Illinois Appellate Court stated the point with unusual clarity. In Chestnut v. Louisville & N. R. Co., 335 Ill. App. 254, 81 N. E. (2d) 660, 662 (Ill. App., 1948), the court said:

"However, if the doctrine [of res ipsa loquitur] is applicable to this case it does not aid the plaintiff in support of the peremptory instruction given by the court for the reason that the overwhelming weight of authority, both in Federal courts and State courts, holds **the doctrine of res ipsa loquitur allows inferences of defendant's guilt, but does not compel such inference, or, in other words, the doctrine will permit the plaintiff to take his case to the jury and allow the jury to draw inferences of defendant's guilt, but will not support, or compel, a directed verdict.** See A. L. R. notes, 167 A. L. R. 658; 153 A. L. R. 1134; 53 A. L. R. 1434, and Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914 D, 905."

In O'Donnell v. Elgin J. & E. R. Co., 171 F. 2d 973 (7th Circuit, 1948), although there was a division of the Court,

there was unanimity on this rule of law. The majority opinion held (l. c. 976):

"• • • We think the true rule is that where a coupler does break, **the jury may, if they think it reasonable under all the circumstances, infer that the coupler was defective** and was furnished and used in violation of the Act. The cases go no further than to hold that from the breaking of a coupler the jury may infer negligence. New Orleans & N. E. R. R. v. Scarlet, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752; Minneapolis & St. Louis R. R. v. Gotschall, 244 U. S. 66, 37 S. Ct. 598, 61 L. Ed. 995, and Vigor v. Chesapeake & O. Ry., 7 Cir., 101 F. 2d 865. **Permitting the jury to infer negligence from the breaking of the coupler with no other proof of negligence, as in the Gotschall case, is a different thing from telling the jury they must find negligence from the breaking of the coupler.** It is the difference between leaving the question to the jury and peremptorily instructing the jury to find for plaintiff."

The dissenting opinion of Judge Minton (now Mr. Justice Minton) held (l. c. 978):

"• • • Although neither side requested the Court to instruct **the jury that it might draw an inference of negligence from the mere breaking of the coupler** and the plaintiff did not object that such an instruction, **which is the correct rule governing this case**, was not given, I do not think, under the circumstances here presented, that Rule 51 requires us not to notice this omission. The breaking of the coupler is the fact which raises the most important question of law in this case. **The plaintiff timely and distinctly objected to the court's failure to instruct that the breaking was in and of itself negligence.** While this ob-

jection was predicated upon an incorrect conception of the law, it was sufficient to direct the attention of the court and place it under duty to instruct on the law properly applicable to this crucial fact.

* * * * * * *

"* * * Instead of instructing the jury that it might infer negligence from the breaking of the coupler, the court told the jury it could not infer negligence from the happening of the accident. This was error."

The O'Donnell case is also now under submission before your Honors, on another certiorari, but there is no suggestion in either opinion below, questioning this basic rule of law.

In his memorandum explaining the order overruling the motion for a new trial in the Affolder case, Judge Hulen cites three other portions of his charge as being exonerative of the faulty portion quoted (Abs. 180).

First he says:

"* * * following that part of the charge isolated and quoted by defendant in its brief the following appears in the charge:

"'"Now, I charge you in this case that if you find and believe from the evidence that at the time and place mentioned in evidence, defendant was hauling or using on its lines one or more cars equipped with couplers **which did not couple by impact**, and that by reason thereof a separation occurred between the Pennsylvania hopper car and the Rock Island box car, **and** that said separation was **due to a failure** on the part of the couplers of either car **to function properly and to couple automatically on impact**, then in that event you are instructed that the defendant vio-

lated the Safety Appliance Act that I have referred to.'''

Far from exonerating the faulty instruction, this portion compounds the error. The criterion there stated is "using * * * cars equipped with couplers **which did not couple** by impact." This is only another way of saying "that any such coupler did in fact fail to couple automatically by impact." The hypothesis is the same—it was conceded at the trial. The use of such a car (i. e., "one **which did not couple**") properly should be only the basis of an inference of the use of one which **could not couple** (authorities, supra, pp. 19 to 21), which is the true criterion under the statute.

The conjunctive clause in the charge "and that said separation was due to a failure * * * to function properly and to couple automatically by impact" adds nothing. The phrase "to function properly" is meaningless unless it is defined. It is defined by the erroneous quoted portion of the charge, which establishes liability if "any such coupler did in fact fail to couple automatically by impact." "Failure * * * to function properly" could have meant nothing but "failure * * * to couple automatically on impact," which is the phrase which immediately follows it, and which is but a third repetition of the very vice complained of. *Noscitur a sociis.*

This sentence ends with the clause:

"* * * then in that event you are instructed that the defendant violated the Safety Appliance Act that I have referred to."

This is a positive, unequivocal direction to make the inference. The sentence should have ended with the clause (taken from the Linehan case, supra):

"* * * then in that event you should give it such weight as it is entitled to in determining the ultimate question you are called to decide, and that is, whether or not the defendant equipped the cars in question with couplers which would couple automatically upon impact."

The second portion of the charge referred to in the court's memorandum (Abs. 180) as exonerating the erroneous instruction effectively puts the burden of proof on defendant. It reads:

"On the other hand, if you should find and believe from the evidence that the separation of the cars, that is, the Pennsylvania car and the Rock Island car, was due to some other cause, that a failure to provide couplers coupling automatically by impact did not cause it, or that the separation of the cars, regardless of its cause, was not the proximate cause of plaintiff's injuries, then your verdict in this case should be for the defendants."

Defendant could be acquitted thereunder only if the jury affirmatively found "that a failure to provide couplers coupling automatically by impact did not cause it." In the event of no finding of this sort, a verdict for the plaintiff must follow. Further, this instruction, instead of modifying the erroneous instruction, is modified by it. It opens with the phrase "on the other hand", which is an obvious demonstration that it is only an attempted converse statement of the plain and explicit instructions previously given to find a violation if the cars "in fact" failed to couple.

The third extract from the charge quoted by the trial court in exoneration of the erroneous instruction (R. 180, 181) is not relevant. This whole portion of the charge

only withdrew from the jury questions of negligence and contributory negligence. It in no way mollified the erroneous instruction.

But petitioner seems now to take the position here, not that the inference was not compelled, but that it was properly compelled; that proof of a failure "in fact" to couple constitutes, not grounds for an inference, but absolute proof of a violation of the coupler statute.

Of the vast numbers of authorities on the subject, petitioner has found two statements, which, removed from their contexts, contain dicta with which he supports the proposition.

The statement in the Auchenbach case (Phila. & R. Ry. Co. v. Auchenbach, 16 F. 2d 550, 552): "The failure of a coupler to work at any time sustains a charge that the Act has been violated" is in quotation marks. Although a number of authorities are cited following the statement, we cannot find the source of the quotation. Certainly in the context the word "charge" means "allegation" and not "instruction". Otherwise construed, it must be pure dictum, for the issue in that case was concerning not the manner of the submission—the charge (instruction) is not set out—but concerning the propriety of any submission. Petitioner omits to quote in his suggestions what follows immediately after the passage referred to (l. c. 552):

> "Applying this test to the evidence * * * **we think there was enough to require submission** and to sustain the verdict."

The Keddy case (A. T. & S. F. v. Keddy, 28 F. 2d 952, 955) contains a paraphrase of a charge which would, we feel, be objectionable under the authorities we rely on. However, there was only a general objection to the charge at the trial, and on appeal the only objection made was that the charge required the coupler be operable **by**

means of a lift pin lever, which was not required by the statute. Doubtless had the point been made for which the opinion is now cited by respondent, we would know more about the charge than what appears in the meager paraphrase. But at the most the paraphrased charge did not forestall a verdict, as was true in the Affolder case. All it did was to exclude the effect of certain testimony.

The gist of petitioner's argument in this Court is contained in the following quotation from his suggestions (Petition and Brief, p. 30):

> "It was consequently sufficient for the District Court, by its charge, to require the jury to find, on this proof, that defendant was hauling or using on its line one or more cars equipped with couplers **which did not couple automatically on impact.** It was proper to submit this simple issue in the very language of the statute."

In thus paraphrasing the statute, petitioner himself has fallen into the same error into which he led Judge Hulen at the time of the charge ("Mr. Eagleton's instruction", R. 173). The statute does not forbid the use of cars "which did not couple". It forbids the use of cars which do not have "coupling" couplers. There is a distinction, vital, crucial. The statute is phrased in the present imperfect tense; respondent's paraphrase (like the trial judge's) is in the past absolute tense.

Of this careless habit Mr. Justice Holmes once said (Northern Securities Co. v. U. S., 193 U. S. 197, 403):

> "Much trouble is made by substituting other phrases assumed to be equivalent, which are then reasoned from as if they were in the Act . . . I stick to the exact words used."

Lastly, while a charge should be read as a whole, this can be done only if the charge actually is a whole, and if it is a paradox, it is error.

In New York Life v. Hunter, 32 F. (2d) 173, 174 (C. C. A. 8th, 1929), the Court held:

> "A general instruction was given at the outset in accordance with the Hilton-Green case, but it was qualified by special instructions which authorized the jury to return a verdict for the plaintiff if certain facts were found in her favor. If the latter instructions were erroneous, the prejudice was not removed by the former instructions."

And in Standard Life & Accident Ins. Co. v. Sale, 121 F. 664, 57 C. C. A. 418, 61 L. R. A. 337 (C. C. A. 6th, 1903), the Court held (121 F., l. c. 669):

> "These instructions stated the law correctly. But the mere giving them without recalling or explaining the instructions given on the court's own motion would not be likely to remove the impression already made. In order to render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced.
>
> "The difficulty created by inconsistent or contradictory instructions on a material point is, first, that it is impossible for the jury to know which is to be their guide; and, secondly, it is impossible after verdict to ascertain which instruction the jury followed."

In conclusion, we advert to the opinion of Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29 (1944), a case in which the injured party was represented by the same counsel as appear for the plaintiff here, and in which this Court held (l. c. 35):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain

inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra, 68; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion."

The shoe pinches equally on either foot; the criterion not, Mr. Justice Douglas says, "who loses below." If he court may not forbid a jury from making inferences ermitted under the law, neither can it require the jury o make inferences permitted under the law. If the plain-

tiff was deprived of the right of trial by jury in the Tennant case, the defendant was deprived of a right of trial by jury in the Affolder case. Inferences are for the jury, not for the court. The new trial was correctly ordered.

3.

Did the Trial Court Abuse His Discretion in Reviewing the Amount of the Verdict?

The opinion of the Court of Appeals disposed of the point on the amount of the verdict as follows (174 F. 2d 493):

> "The assignment of error that the verdict is excessive is not properly addressed to this court. Public Utilities Corporation of Arkansas v. McNaughton, 8 Cir., 39 F. 2d 7; Sun Oil Co. v. Rhodes, 8 Cir., 15 F. 2d 790; City of Lincoln v. Power, 151 U. S. 436, 14 S. Ct. 387, 38 L. Ed. 224; New York, L. E. & W. R. Co. v. Winter, Admr., 143 U. S. 60, 12 S. Ct. 356, 36 L. Ed. 71; Kurn v. Stanfield, 8 Cir., 111 F. 2d 469; Kroger Grocery & Baking Co. v. Young, 8 Cir., 66 F. 2d 700, 92 A. L. R. 1166."

The Court thus held it had no power to consider the point raised, that "The verdict was so greatly excessive that the trial court, in reducing the verdict by remittitur from $95,000 to $80,000 instead of awarding a new trial, was guilty of an abuse of discretion."

This holding is in conflict with the rule of law clearly expressed in the opinion of the U. S. Court of Appeals for the Fourth Circuit in Virginian Ry. Co. v. Armentrout, 166 F. 2d 400, l. c. 408, which held:

> "• • • We do not understand the rule to have application, however, in those exceptional circumstances

where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion."

Obviously, if in this Court the judgment of the Court of Appeals in this case be affirmed, and the cause remanded for a new trial, or if the cause be reversed with instructions to enter judgment in accordance with defendant's motion for a directed verdict, this point is moot.

But if it be held that the motion for directed verdict was properly ruled by the trial court and that the jury was properly instructed, then the cause should be remanded to the Court of Appeals with instructions to consider and pass upon the appellant's third assignment of error. U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 126.

Respectfully submitted,

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